

JUL 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1598

(4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

EASTERN AIRLINES, INC.,
Petitioner,
v.

ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED APRIL 10, 1990
CERTIORARI GRANTED JUNE 4, 1990

BEST AVAILABLE COPY

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¹ The opinions of the Eleventh Circuit Court of Appeals and the United States District Court for the Southern District of Florida are reprinted in the appendix to the petition for writ of certiorari at Pet. App. A and Pet. App. B, respectively, and have not been reproduced here. Likewise, the order of the Eleventh Circuit Court of Appeals denying rehearing, is reprinted in the appendix to the petition at Pet. App. D, and is not reproduced here.

² This case comprises twenty-five actions which were jointly considered by the district court and court of appeals. The parties stipulated during the trial court proceedings that the pleadings in the *Floyd* case, which were included in the record excerpts before the Eleventh Circuit Court of Appeals, are representative of all of the plaintiffs' complaints. Accordingly, the operative complaint and answer are reproduced for this Court's review.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MDL Docket No. 575

IN RE: EASTERN AIRLINES ENGINE FAILURE,
MIAMI INTERNATIONAL AIRPORT ON MAY 5, 1983

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

Date	Filings-Proceedings
08/05/83	Eastern's Petition for Removal from the Eleventh Circuit Court in and for Dade County, Florida including Plaintiffs' Original Complaint filed.
08/12/83	Eastern's original Answer filed.
06/15/84	Plaintiffs' Amended Complaint filed.
06/19/84	Eastern's Answer to Amended Complaint filed.
04/18/85	Eastern's Motion for Judgment on the Pleadings and Memorandum of Law filed.
06/03/85	Plaintiffs' Memorandum of Law Opposing Eastern's Motion for Judgment on the Pleadings filed.
07/10/85	Eastern's Reply Memorandum in Support of its Motion for Judgment on the Pleadings filed.
02/03/85	Memorandum Opinion and Order of United States District Court for Southern District of Florida, Dismissing Complaints, reported at 629 F.Supp. 307 (S.D. Fla. 1986) filed.
04/29/86	Order of United States District Court Denying Motions for Reconsideration filed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 86-5381

IN RE: EASTERN AIRLINES, INC., ENGINE FAILURE,
MIAMI INTERNATIONAL AIRPORT ON MAY 5, 1983

ROSE MARIE FLOYD and TERRY FLOYD, *et al.*,
Appellants,
vs.

EASTERN AIRLINES, INC.,
Appellee.

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

Date	Filings-Proceedings
05/28/86	Plaintiffs' Notice of Appeal filed.
05/05/89	Opinion of the Court of Appeals for the Eleventh Circuit filed—reversed, reported at 872 F.2d 1462 (11th Cir. 1989).
01/11/90	Order of Court of Appeals for the Eleventh Circuit Denying Eastern's Petition for Rehearing and Suggestion of Rehearing En Banc filed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 83-1949-Civ-LCN

ROSE MARIE FLOYD and TERRY FLOYD, her husband,
Plaintiffs,
vs.

EASTERN AIRLINES, INC., a Delaware corporation,
licensed to do business in Dade County, Florida,
Defendant.

AMENDED COMPLAINT

Plaintiffs, ROSE MARIE FLOYD and TERRY FLOYD, her husband, sue defendant, EASTERN AIRLINES, INC. (EASTERN), and allege:

1. This is an action for damages for personal injuries to plaintiffs for amounts exceeding Five Thousand (\$5,000.00) Dollars.
2. At all times material to this action, plaintiffs were and are residents of Dade County, Florida.
3. At all times material to this action, EASTERN was and is a Delaware corporation, licensed to do business in Dade County, Florida.
4. At all times material to this action, EASTERN was and is a common carrier of passengers for hire and engaged in the operation of a fleet of aircraft in the business of air transportation of the public, and thus owed the highest duty of care to its passengers.
5. At all times material to this action, EASTERN, acting through its agents, servants or employees in the course or scope of their agency, service, or employment,

controlled, maintained and operated the aircraft involved in the incident out of which this litigation arises.

COUNT I

EASTERN'S BREACH OF CONTRACT TO USE HIGHEST DEGREE OF CARE

6. On or before May 5, 1983, plaintiff ROSE MARIE FLOYD purchased or caused to be purchased from EASTERN, for valuable consideration, a ticket to transport her from Miami International Airport in Dade County, Florida, to Nassau, Bahamas, and at such time and place entered into a contract with EASTERN for safe transportation.

7. At all times material to this action, the relationship of passenger and common carrier for hire existed between EASTERN and ROSE MARIE FLOYD.

8. The ticket purchased from EASTERN was the standard and customary ticket of transportation sold to passengers for this particular flight; a copy of the ticket or contract is attached to this complaint.

9. All conditions precedent to the relief demanded herein have been performed or have occurred.

10. Pursuant to said contract for transportation, ROSE MARIE FLOYD, on or about May 5, 1983, boarded Eastern flight No. 855, bound for Nassau, Bahamas out of Miami International Airport; shortly after take off, one of the aircraft's engines failed, and the plane turned around for return and landing in Miami, although Nassau was then closer. After turning around, the aircraft's other two engines also failed.

11. The crew and passengers were prepared for ditching of the aircraft as it lost altitude because of the failure of the engines. Finally, after an extended period of flight without any engines whatsoever, the crew was able

to restart one engine, under whose sole power the plane ultimately landed at Miami International Airport.

12. Pursuant to its contract with ROSE MARIE FLOYD, EASTERN promised and agreed to exercise the highest degree of care in order to transport ROSE MARIE FLOYD to her destination, but Eastern breached said contract and failed to exercise the highest degree of care in transporting ROSE MARIE FLOYD to her destination, in, among other things:

- a. failing to properly, adequately and safely service and maintain said flight no. 855 by failing to install oil seals or "O-rings" in the engines;

- b. failing to properly, adequately and safely inspect said flight no. 855 and thus failing to discover the absence of the essential O-rings;

- c. failing to advise, train or supervise its agents, employees, servants or representatives in the reasonable and proper methods of inspection, maintenance and service of aircraft;

- d. operating an aircraft which EASTERN knew or by the exercise of reasonable diligence should have known had been improperly maintained and serviced and was not fit for flight;

- e. failing to maintain the highest standard of care and safety required under the Federal Aviation Act, by a common carrier for hire.

13. As a direct and proximate result of the breach by EASTERN, ROSE MARIE FLOYD suffered severe and permanent mental pain and anguish, fright, distress, and inability to lead a normal life. ROSE MARIE FLOYD further has incurred or will incur medical expenses and lost earnings and earning capacity.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory damages in excess of the jurisdictional limits of this

Court, together with costs and interest and demands a trial by jury of all issues herein triable as of right by a jury.

COUNT II
EASTERN'S NEGLIGENCE

14. Plaintiff ROSE MARIE FLOYD, by reference, reiterates and realleges paragraphs 1-13 above, and further alleges:

15. On or about May 5, 1983, EASTERN was guilty of each and all of, but not limited to, the following negligent acts of omission or commission:

- a. failure to properly, adequately and safely service and maintain said flight no. 855 by failing to install oil seals or "O-rings" in the engines;
- b. failure to properly, adequately and safely inspect said flight no. 855 and thus failing to discover the absence of the essential O-rings;
- c. failure to advise, train or supervise its agents, employees, servants or representatives in the reasonable and proper methods of inspection, maintenance and service of aircraft;
- d. operation of an aircraft which EASTERN knew or by the exercise of reasonable diligence should have known had been improperly maintained and serviced and was unfit for flight;
- e. failure to maintain the highest standard of care and safety required under the Federal Aviation Act, by a common carrier for hire.

16. As a direct and proximate result of the negligence of EASTERN, ROSE MARIE FLOYD suffered severe and permanent mental pain and anguish, fright, distress, and inability to lead a normal life. ROSE MARIE FLOYD further has incurred or will incur medical expenses and lost earnings and earning capacity.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory damages in excess of the jurisdictional limits of this Court, together with costs and interest and demands a trial by jury of all issues herein triable as of right by a jury.

COUNT III
EASTERN'S ENTIRE WANT OF CARE

17. Plaintiff ROSE MARIE FLOYD, by reference, reiterates and realleges paragraphs 1-16 above and further alleges:

18. EASTERN's acts in failing to properly inspect, maintain and operate its aircraft on flight no. 855 on May 5, 1983, constituted an entire want of care or attention to its duty and showed great indifference to the persons, property and rights of the plaintiff. More particularly, EASTERN's records reveal at least one dozen prior instances of engine failures due to missing O-rings, and yet Eastern failed to institute appropriate procedures to cure this maintenance problem despite such knowledge.

19. EASTERN's entire want of care or attention to duty and great indifference to the persons, property and rights of the plaintiff reasonably implies such wantonness, willfulness, and malice as would justify punitive damages.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory and punitive damages in excess of the jurisdictional limits of this Court, together with costs and interests and demands trial by jury of all issues herein triable as of right by a jury.

COUNT IV
CLAIM UNDER WARSAW CONVENTION

20. Plaintiff, ROSE MARIE FLOYD, by reference, reiterates and realleges paragraphs 1-19 above and further alleges:

21. This is an action for damages pursuant to the Warsaw Convention, a federal treaty (49 Stat. 3000).

22. Pursuant to the Convention, defendant owed a duty of care to the plaintiffs which duty, by reason of the negligent or willful misconduct as aforesaid, was breached, proximately resulting in damages to plaintiffs.

23. The Convention creates, by its terms and fair implications therefrom, a cause of action under federal law, independent and apart from any claims plaintiffs may have pursuant to state law.

WHEREFORE, plaintiff, ROSE MARIE FLOYD, sues defendant, EASTERN AIRLINES, INC., for compensatory and punitive damages in excess of the jurisdictional limits of this Court, together with costs and interests and demands trial by jury of all issues herein triable as of right by a jury.

COUNT V

LOSS OF CONSORTIUM

24. Plaintiff TERRY FLOYD, by reference, reiterates and realleges paragraphs 1-23 above and further alleges:

25. As a direct and proximate result of EASTERN's breach of contract, negligence, and entire want of care, plaintiff TERRY FLOYD has lost the society, services and consortium of his wife, plaintiff ROSE MARIE FLOYD, and such loss is permanent.

WHEREFORE, plaintiff TERRY FLOYD sues defendant, EASTERN AIRLINES, INC., for compensatory and punitive damages in excess of the jurisdictional limits of

this court, together with costs and interests and demands trial by jury of all issues herein triable as of right by a jury.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 15 day of June, 1984, to: LAURA J. PEARSON, ESQ., Thornton, David & Murray, P.A., Suite 210, Ingraham Building, 25 S.E. Second Avenue, Miami, Florida 33131.

Respectfully submitted,

FULLER AND FEINGOLD, P.A.
1111 Lincoln Road, Suite 802
Miami Beach, Florida 33139

- and -

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By: /s/ Michael S. Olin
MICHAEL S. OLIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 83-1949-CIV-LCN

ROSE MARIE FLOYD and TERRY FLOYD, her husband,
Plaintiffs,
vs.

EASTERN AIR LINES, INC., a Delaware corporation,
licensed to do business in Dade County, Florida,
Defendant.

ANSWER TO AMENDED COMPLAINT

The Defendant, EASTERN AIR LINES, INC., hereinafter referred to as ("EASTERN") answers Plaintiffs' Amended Complaint as follows:

**FIRST DEFENSE—RESPONSE
TO COMPLAINT ALLEGATIONS**

1. All allegations of the Complaint, except those hereinafter expressly admitted, are denied.

2. Without knowledge.

3. Admitted.

4. Admitted.

5. Admitted.

AS TO COUNT I

6. Admitted.

7. Admitted.

8. Admitted.¹

¹ The complete ticket is attached to other pleadings.

- 9. Denied.
- 10. Admitted.
- 11. Admitted.

12. In answer to Paragraph 12 EASTERN admits existence of a contract with Plaintiff in the form of a passenger ticket and states that the terms and provisions thereof, including terms and provisions adopted by reference, speak for themselves. Eastern denies that it breached any term or provision of the contract and denies that it failed to exercise the degree of care required by the contract and applicable law. All subparagraphs of Paragraph 12 are denied.

- 13. Denied.

AS TO COUNT II

14. EASTERN adopts by reference Paragraphs 1 through 13 of this Answer.

15. EASTERN denies Paragraph 15, including all subparagraphs contained therein.

- 16. Denied.

AS TO COUNT III

17. EASTERN adopts by reference Paragraphs 1 through 16 of this Answer.

- 18. Denied.

- 19. Denied.

AS TO COUNT IV

20. EASTERN adopts by reference Paragraphs 1 through 19 of this Answer.

- 21. Admitted.

22. Denied, subject to Paragraphs 30, 31 and 32 of this Answer.

23. Denied, subject to Paragraphs 30, 31 and 32 of this Answer.

AS TO COUNT V

24. EASTERN adopts by reference Paragraphs 1 through 23 of this Answer.

25. Denied.

SECOND DEFENSE—AS TO COUNT I

26. Count I of the Complaint fails to state a claim upon which relief can be granted because the damages alleged for fright, mental anguish and the like were not in contemplation of the contracting parties as a probable result of the contract breach; or, in the alternative, the contract alleged is merely inducement and absent allegations of a physical impact experienced by Plaintiff, there can be no recovery under this Court.

THIRD DEFENSE—AS TO COUNT II

27. Count II of the Complaint fails to state a claim upon which relief can be granted because compensatory damages cannot be recovered for fright, mental anguish and the like absent allegations of a physical impact experienced by Plaintiff or allegations of facts, not conclusions, showing wilfull, wanton and malicious conduct.

FOURTH DEFENSE—AS TO COUNT III

28. Count III of the Complaint fails to state a claim upon which relief can be granted because, save legal conclusions asserted, there are no facts alleged showing willful, wanton or malicious conduct on the part of Defendant to support recovery of punitive damages.

FIFTH DEFENSE—AS TO COUNT V

29. Count V of the Complaint fails to state a valid claim for loss of consortium because loss of consortium is a derivative claim and the Complaint wholly fails to state an underlying cause of action upon which such derivative claim can be based.

SIXTH DEFENSE—AS TO ALL COUNTS

30. The air transportation involved, including the incident alleged, occurred on international transportation and is subject to and controlled by the Warsaw Convention.²

31. Pursuant to Warsaw, EASTERN's liability is confined to "bodily injury" suffered by a passenger if caused by an "accident" on board the aircraft and since (a) no "accident" occurred, (b) no "bodily injury" was sustained by Plaintiff and (c) punitive damages are not recoverable under Warsaw, EASTERN has no liability to Plaintiffs herein.

SEVENTH DEFENSE—AS TO ALL COUNTS

32. Pursuant to Warsaw (as modified by the Montreal Interim Agreement) Plaintiffs' total damages, if any are recoverable, are limited to \$75,000.00 U.S. per ticketed passenger.

EIGHTH DEFENSE—AS TO ALL COUNTS

33. Even though Plaintiffs are claiming under the Federal Aviation Act of 1958 and even though Warsaw governs the subject international transportation, Florida law applies and in the absence of a physical impact experienced by Plaintiff during the flight, Plaintiffs cannot recover the damages claimed in the Complaint.

WHEREFORE, having fully answered the Complaint, Defendant moves for judgment in its favor and recovery of its defense costs.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 18 day of July, 1984

² Warsaw or Warsaw Convention, as used in pleadings, means and includes the Montreal (Interim) Agreement. Warsaw is cited 49 Stat. 3000. Montreal is cited CAB Agreement 18900 approved by Order No. E-23680 May 13, 1966, 31 Fed. Reg. 7302.

to: Michael S. Olin, Esquire, Suite 1201, City National Bank Building, 25 W. Flagler Street, Miami, FL 33131 and Fuller & Feingold, P.A., 1111 Lincoln Road, Miami Beach, FL 33139.

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By: /s/ **Laura J. Pearson**
LAURA J. PEARSON